BEFORE THE
SHORELINES HEARINGS BOARD
STATE OF WASHINGTON

IN THE MATTER OF GARY MOSE, Appellant, v. STATE OF WASHINGTON, DEPARTMENT OF ECOLOGY, Respondents.	SHB PCHB No. 87-19 FINAL FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

THIS MATTER, the appeal from the Department of Ecology and Snohomish County's Notice of Penalty No. DE 87-102 for $1,000 came on for hearing before the Shoreline Hearings Board, Lawrence J. Faulk (Presiding), Wick Dufford, Judith A. Bendor, Nancy Burnett and Robert C. Schofield, at a formal hearing in Seattle, Washington, on October 26, 1987.

Appellant represented himself. Respondent Department of Ecology appeared by Jay J. Manning, Assistant Attorney General. Respondent Snohomish County appeared by Traci Goodwin, Deputy Prosecuting Attorney. Reporter Cheri L. Davidson of Gene Barker and Associates recorded the proceedings.

Witnesses were sworn and testified. Exhibits were examined. From testimony heard and exhibits examined, the Board makes these

FINDINGS OF FACT

I

Appellant Gary Mose and his wife own property on Pilchuck Creek in the NE 1/4 of Section 20, Township 32N, Range SE in Snohomish County. The property is about 5 miles north of Arlington. At the present time there is no house or other structural development on the property. Lawn has been planted and an access road has been built.

II

Respondent Department of Ecology (DOE) is a state agency charged with the supervision and enforcement of the state's Shoreline Management Act (SMA). Respondent Snohomish County is a political subdivision charged with implementing the SMA through the Snohomish County Shoreline Master Program. (SCSMP)

III

The wetted perimeter and banks of Pilchuck Creek, as it flows by appellant's property, are within shorelines of the state. The SCSMP environment designation covering the site is Conservancy.

Pilchuck Creek supports salmon runs of chinook, coho, pink and chum. It also supports steelhead and sea-run cutthroat trout. Coho and trout juveniles rear in the stream during the summer.

IV

The main channel of Pilchuck Creek bends along the Mose property. The property lies on the outside of the bend, and the water from the creek strikes it with considerable force, particularly during periods of high flow. The water table is high and the earth is soft so the bank of appellant's property is naturally subject to a great deal of erosion. Across the main channel from the Mose tract is an island, and on the opposite side of the island runs a smaller side channel of the stream. In the past this side channel has become clogged with debris.

V

Mose met with a representative of the state Department of Fisheries in August 1984, on the site, and discussed with him securing permission to remove debris from the side channel. As a result a hydraulic project approval (HPA) was applied for and, ultimately, issued to Mose. The permit authorized debris removal to be completed by October 1, 1984, subject to the express condition that "No vehicles or equipment shall be permitted to enter or operate in the water."

VI

The present saga began after the appellant completed the purchase of the property in early 1985. He made the purchase recognizing that he had an erosion problem. So he made inquiries about how to stop his bank from washing away. On May 13, 1985, representatives of several

agencies, including the Department of Fisheries and Snohomish County met on the site to evaluate the problem. At this meeting the County's shorelines planner advised the other agency representatives that structural methods of stabilization such as riprapping would not be allowed under the SCSMP.

VII

On June 5, 1985, Fisheries' representatives and the County's shorelines planner met with Mose on his property. By then Mose had applied for a new HPA to riprap 400 feet of bank. At the meeting alternatives to riprapping were discussed. It was suggested that Mose investigate a design utilizing a combination of logs and vegetative planting on the bank. The County planner advised Mose directly that riprap was not allowed by the master program at his site.

VIII

The appellant then requested delay in the processing of his HPA application to develop plans for an alternate bank stabilization approach. However, no such plans were ever submitted to Fisheries and the HPA application was not pursued further. No HPA was ever issued.

Moreover, Mose did not, thereafter, apply to the County for a permit authorizing any bank protection or other work on the site under the SMA, although it was the clear expectation of the shoreline planner that he would do so.

IX

In late January of 1986, Mrs. Mose visited the office of the County's shorelines planner to report that rainfall and flooding over Martin Luther King Day weekend had caused severe erosion and washed away a portion of their bank. She wanted to know what could be done about it. She was advised riprap was not allowed, except to protect existing development or prime agricultural land or to prevent serious impairment of channel function. She was advised that "existing development" was interpreted to mean an existing house or building.

X

In June of 1986, about a year after the last meeting on the Mose property, Mr. Mose ran into one of Fisheries' agents on the street near a shopping mall. They had a brief conversation during which the Fisheries agent mentioned that work valued at less than $2,500 was to be exempt from shorelines permits after July 1, 1986.

XI

On August 7 and 8, 1986, appellant attempted to solve the erosion problem along his property with a bulldozer. He constructed a gravel berm across the main channel of the creek and removed a log jam from a side channel, and diverted almost all of the flow through the side channel. Then he bulldozed gravel from approximately 400 feet of the main channel up against the bank of his property. The effect was substantially to dewater the main channel for a period of about a month, until waters from next big rain washed out the berm.

XII

The dewatering and dredging work done by the bulldozer caused damage to the fisheries resources of the stream which will continue to impact the watercourse for several years. Losses of juvenile fish, future egg production, and habitat values are not precisely quantifiable but by conservative estimate exceed the $2,500 shoreline permit exemption figure.

XIII

On January 30, 1987, DOE and Snohomish County issued Notice of Penalty Incurred and Due No. DE 87-102 to Mr. and Mrs. Mose. This penalty in pertinent part provided:

> Notice is hereby given that you have incurred, and there is now due from you, a penalty in the amount of $1,000.00 under the provisions of RCW 90.58.210.
>
> A site inspection has revealed that work has occurred in and adjacent to the channel of Pilchuck Creek, including bulldozing 400 feet and realignment of the channel, on property owned by Gary Mose and Jane Doe Mose, and their marital community, in Snohomish County. The legal description of this property is the N.E. 1/4 of Section 20, Township 32 North, Range 5 East, Willamette Meridian. This work violates RCW 90.58.140 because no permit was obtained. The work violates the Snohomish County Shoreline Master Program's policies and regulations pertaining to dredging, land filling, and shoreline stabilization and flood protection.

XIV

Appellant Gary Mose applied for relief from penalty. On April 16, 1987, the DOE and Snohomish County denied relief, citing, among other reasons, the following:

> Personnel from Snohomish County and the Washington State Department of Fisheries met with defendant Gary Mose on site and recommended bank stabilization measures which did not include the use of a bulldozer to reroute the channel of the creek. In disregard of their knowledge of the proper bank stabilization measures, defendants violated Chapter 90.58 RCW.

Feeling aggrieved by this decision appellant appealed to this Board on May 12, 1987. On May 19, 1987, a pre-hearing conference was held.

XV

What we have here is not a failure to communicate, but a failure to accept the message that is communicated. Mr. Mose' conviction was and is that he should be allowed to protect his property by riprapping. He declined to pursue alternative methods. He declined to accept that riprapping is prohibited - although, he had actual knowledge that this is so.

No one gave him permission to enter the stream with equipment. No one gave him permission to rechannel the streambed. No one authorized the resource damage he caused.

Unable to secure approval for what he wanted to do, he simply became frustrated and took the bulldozer by the horns and did the work in the creek.

XVI

Any Conclusion of Law which is deemed a Finding of Fact is hereby adopted as such.

From these Findings of Fact, the Board comes to these

CONCLUSIONS OF LAW

I

The Board has jurisdiction over these matters and these parties. Chapter 90.58 RCW, Chapter 43.21B RCW.

II

RCW 90.58.210(2)(3) states:

> (2) Any person who shall fail to conform to the terms of a permit issued under this chapter or who shall undertake development on the shorelines of the state without first obtaining any permit required under this chapter shall also be subject to a civil penalty not to exceed one thousand dollars for each violation. Each permit violation or each day of continued development without a required permit shall constitute a separate violation.
>
> (3) The penalty provided for in this section shall be imposed by a notice in writing, either by certifid mail with return receipt requested or by personal service, to the person incurring the same from the department or local government, describing the violation with reasonable particularity and ordering the act or acts constituting the violation or violations to cease and desist or, in appropriate cases, requiring necessary corrective action to be taken within a specific and reasonable time.

III

Under RCW 90.58.030, the work done in the streambed and on the bank here qualifies as "development." See English Bay Enterprises v. Island County, 89 Wn. 2d 16, 568 P.2d 783 (1977).

RCW 90.58.140(2) establishes a permit requirement for any "substantial development." Except as qualified by express exemptions, a "substantial development" is

> any development of which the total cost or fair market value, whichever is higher, does not exceed two thousand five hundred dollars, or any development which materially interferes with the normal public use of the water or shorelines of the state. RCW 90.03.030(3)(e).

IV

We conclude that the development in question is a "substantial development."

The waters of Pilchuck Creek belong to the people. RCW 90.03.010. So do the fish within the stream. See Department of Fisheries v. Gillette, 27 Wn.App. 815, 621 P.2d 764 (1980.

The damages to public resources involved here constitute a material interference with the normal public use of the water on shorelines.

V

None of the statutory "substantial development" exemptions are applicable. The work done in the stream and on the bank does not qualify as "normal maintenance or repair of existence structures or developments." RCW 90.58.030(3)(e)(i). There is no existing structure or development to be repaired.

Neither does the development here constitute "emergency construction necessary to protect property from damage by the

elements." RCW 90.58.030(3)(e)(iii). DOE has interpreted this exemption as follows:

> An "emergency" is an unanticipated and imminent threat to public health, safety, or the environment which requires immediate action within a time too short to allow full compliance with this chapter. WAC 173-14-040(1)(d).

The work here occurred during the low flow period of the year. No imminent threat was shown. There was time to comply.

VI

Since the activity at issue was a "substantial development" a permit was required and appellant violated the SMA (RCW 90.58.210) by proceeding without a permit.

VII

Furthermore, from our review of the SCSMP we are convinced that the activities in question were, indeed, prohibited by the master program.

Dredging in a Conservancy environment is limited to the maintenance of existing navigation channels and facilities. SCSMP, F-23. Landfills in such an environment are not permitted adjacent to lakes and rivers. SCSMP, F-36. The regulations for shoreline stabilization and flood protection allow structural measures for bank protection only "when their purpose is to protect existing development or prime agricultural land or to prevent serious impairment of channel function." SCSMP, F-61. None of these purposes was shown to be

present. We agree with the County that "existing development" in this context means an existing residence or other building.

The master program's prohibition of the work done here means that either a variance or a conditional use permit would have been necessary to authorize the project. Thus, even had the definition of "substantial development" not been met, the penalty under RCW 90.58.210 would have been properly imposed. Appellant undertook development "without first obtaining any permit required" under the SMA.

VIII

We note that each day of continued development without a permit constitutes a separate violation. Here the work went on for two days, and the situation remained unremedied for about 30 days.

Furthermore, the violation was egregious. Appellant disregarded what he had been told. He undertook work in the stream which no government official ever suggested was proper. Appellant's frustration cannot excuse his taking the law into his own hands, causing the damages to public resources which occurred.

Under the circumstances, the $1,000 penalty assessed was reasonable.

IX

The appellant asserts that DOE and the County should be prevented from imposing this penalty because his action was taken in reliance on the Fisheries agent's remark that work valued at less than $2,500 was

to become exempt from shorelines permits. We reject this contention.

Appellant did not put a bulldozer in the creek in reliance on any statement made by the County or DOE. The Fisheries agent had no authority to speak for these other agencies and did not purport to do so. Mose knew who the shorelines authorities were.

Moreover, the Fisheries agent did not tell Mose he could dredge the stream for riprap. From the bare mention of the dollar amount of a permit exemption, Mose made a giant mental leap. He assumed he could create the kind of bank protection he knew to be prohibited by the master program by a method no one had remotely suggested was proper. This was patently unreasonable. The elements of equitable estoppel were not shown. See Chemical Bank v. WPPSS, 102 WN. 2d 874, 691 P.2d 524 (1984).

X

Any Finding of Fact which should be deemed a Conclusion of Law is hereby adopted as such.

From these Conclusions the Board enters this

ORDER

Department of Ecology and Snohomish County's Notice of Penalty Incurred and Due No. DE 87-102 is AFFIRMED.

DATED this 25th day of January, 1988.

SHORELINES HEARINGS BOARD

LAWRENCE J. FAULK, Presiding

WICK DUFFORD, Chairman

JUDITH A. BENDOR, Member

NANCY BURNETT, Member

ROBERT C. SCHOFIELD, Member